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5 UNITED STATES DISTRICT COURT  
6 DISTRICT OF NEVADA

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8 AMERICAN REALTY INVESTORS, INC.;  
9 TRANSCONTINENTAL REALTY  
10 INVESTORS, INC.; INCOME  
11 OPPORTUNITY REALTY INVESTORS,  
12 INC.; and PILLAR INCOME ASSET  
13 MANAGEMENT, INC.,

14 Plaintiffs,

15 v.

16 PRIME INCOME ASSET MANAGEMENT,  
17 LLC; PRIME INCOME ASSET  
18 MANAGEMENT, INC.; and HOMETOWN  
19 2006-1 1925 VALLEY VIEW, LLC,

20 Defendants.

Case No. 2:13-cv-00278-APG-CWH

**ORDER DENYING RECONSIDERATION**

21 Presently before the Court are Plaintiffs' motion for reconsideration (Dkt. No. 56) and  
22 motion for stay pending appeal (Dkt. No. 59). For the reasons set forth below, the Court denies  
23 both.

24 **I. BACKGROUND**

25 The relevant factual and procedural background is included in the Court's "Order  
26 Granting Motion for Leave to File Supplemental Evidence and Denying Motion to Remand" (the  
27 "Prior Order," Dkt. No. 52).  
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## II. ANALYSIS

### A. Legal Standard — “Reconsideration”

The district court’s discretion to alter or amend (i.e., reconsider) an order under Rule 54(b) is governed by the law-of-the-case doctrine. *W. Birkenfeld Trust v. Bailey*, 837 F. Supp. 1083, 1085 (E.D. Wash. 1983). Three exceptions to this doctrine permit the court to alter its prior decision, as long as the court has not been divested of jurisdiction over the matter: “(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence” has surfaced that was not previously obtainable in the exercise of due diligence. *Reed v. Town of Gilbert, Ariz.*, 707 F.3d 1057, 1067 n.9 (9th Cir. 2013); *U.S. v. Matthews*, 643 F.3d 9, 14 (1st Cir. 2011). Plaintiffs cite to no intervening change in law or newly surfaced evidence, so the pertinent question is whether the Prior Order was clear legal error and worked a manifest injustice against Plaintiffs.

### B. Legal Standard — Fraudulent Joinder

“Joinder of a non-diverse defendant is deemed fraudulent, and the defendant’s presence is ignored for purposes of determining diversity, if the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state.” *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001) (internal quotation marks and citation omitted).

### C. Alter Ego Claim — Justiciable Controversy

“[A] justiciable controversy [is] a preliminary hurdle to an award of declaratory relief.” *Doe v. Bryan*, 728 P.2d 443, 444 (Nev. 1986). Moreover, “litigated matters must present an existing controversy, not merely the prospect of a future problem.” *Id.* The Nevada Supreme Court has articulated the following definition of justiciable controversy:

“(1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.”

1 *Id.* (quoting *Kress v. Corey*, 189 P.2d 352, 364 (Nev. 1948)).

2 **1. Premature Decision of the Merits**

3 Plaintiffs rely on *Hunter v. Phillip Morris USA*, 582 F.3d 1039 (9th Cir. 2009), to argue  
4 that justiciability was prematurely raised by the Court, and that it should have been raised, if at  
5 all, only by Hometown LLC as a defense in the state court, post-remand. As explained above, the  
6 primary inquiry regarding fraudulent joinder is whether Plaintiffs have failed to state a claim  
7 under the settled rules of the State of Nevada.

8 In *Hunter*, the Ninth Circuit rejected a federal preemption defense as part of the fraudulent  
9 joinder analysis because the defense relied on an analysis of federal law. In addition, using  
10 preemption to determine removal jurisdiction violated the well-pleaded complaint rule, which  
11 provides that federal jurisdiction must be evident on the face of the complaint and cannot be  
12 solely supported by an anticipated defense that relies on federal law. *Id.* at 1042–43.

13 Here, the justiciability analysis relies entirely on Nevada law, and justiciability is a  
14 “preliminary hurdle” to the exercise of jurisdiction rather than a defense to the merits. *Bryan*, 728  
15 P.2d at 444. In the Prior Order, the Court properly looked at Nevada’s justiciability rules to  
16 decide the motion to remand. Finally, on motions to remand, district courts regularly analyze the  
17 justiciability of claims. *See, e.g., Lee v. Am. Nat’l Ins. Co.*, 260 F.3d 997, 1001–02 (9th Cir.  
18 2001) (analyzing Article III standing); *Panhandle Area Council v. State of Idaho*, 393 F. Supp. 2d  
19 1038, 1040–41 (assessing ripeness); *Thorp v. Kepoo*, 100 F. Supp. 2d 1258, 1262 (D. Haw. 2000)  
20 (same); *Picard v. Bay Area Rapid Transit Dist.*, 823 F. Supp. 1519, 1528 (N.D. Cal. 1993)  
21 (same).

22 **2. Not Seeking “Precisely the Same Result”**

23 Plaintiffs argue there is adversity among them and defendants Prime Income Asset  
24 Management, LLC and Prime Income Asset Management, Inc. (the “Prime Defendants”) because  
25 they do not seek “precisely the same result.” Plaintiffs rely on *GTE Sylvania, Inc. v. Consumers*  
26 *Union of U.S., Inc.*, which held that “there is no Art. III case or controversy when the parties  
27 desire ‘precisely the same result.’” 445 U.S. 375, 383 (1980). Plaintiffs’ argument is misguided  
28 for two reasons.

1 First, Nevada law guides the justiciability analysis for fraudulent joinder. Of course this  
2 Court cannot hear a matter if there is no Article III case or controversy. But before reaching that  
3 question, the issue of justiciability under Nevada law must be resolved to determine fraudulent  
4 joinder. As discussed in the Prior Order, the Prime Defendants have no interest in contesting  
5 Plaintiffs' claim of a lack of alter ego liability. *Doe v. Bryan*, 728 P.2d 443, 444 (Nev. 1986).  
6 This is confirmed by their ongoing agreement with the positions Plaintiffs have asserted in this  
7 case. At some level of abstraction, Plaintiffs and the Prime Defendants appear to have adverse  
8 interests. Plaintiffs (larger, public entities) do not want to be liable for the Prime Defendants'  
9 (smaller, private entities) obligations, yet the Prime Defendants allegedly would benefit if they  
10 could share their liabilities with Plaintiffs. But this alleged adversity has not meaningfully borne  
11 out in this case, and the Prime Defendants fail to explain how they would benefit from being  
12 responsible for Plaintiffs' liabilities. Alter ego liability is typically a two-way street. *Mobil Oil*  
13 *Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 269 n.12 (D. Del. 1989) ("[W]here the shareholder  
14 is the alter ego of the corporation, the corporation is likewise the alter ego of its shareholder.").  
15 Even if the adversity were sufficient, however, the Prime Defendants have showed no interest in  
16 *contesting* the claim of no alter ego liability. Therefore, under *Doe v. Bryan*, the alter ego claim  
17 does not present a justiciable controversy under Nevada law.

18 Second, Plaintiffs are correct that an agreement by plaintiffs and defendants on the desired  
19 judicial relief does not itself render a case non-justiciable. *GTE Sylvania*, 455 U.S. at 382–383.  
20 However, Plaintiffs' attempt to expand the holding of *GTE Sylvania* to every case where the  
21 parties agree on the relief sought is unwarranted. In *GTE Sylvania*, the defendants agreed to the  
22 relief sought by the plaintiffs from the U.S. District Court for the District of Columbia ("D.C.  
23 Court"): a declaration under the Freedom of Information Act ("FOIA") that the Consumer  
24 Product Safety Commission ("CPSC") had to release certain accident reports. Before the  
25 declaratory relief action was filed in the D.C. Court, the U.S. District Court for the District of  
26 Delaware ("Delaware Court") had issued an injunction prohibiting release of the reports pending  
27 trial in a separate action. The CPSC stated that it would have released the documents absent the  
28 injunction from the Delaware Court.

1           Declaratory relief from the D.C. Court would have had a significantly different effect on  
2 the parties. If the declaration issued and the CPSC was forced to turn over the documents, then  
3 CPSC's obedience of the Delaware Court's injunction would have amounted to a violation of  
4 FOIA. "In short, the issue in this case is whether, given the existence of the Delaware injunction,  
5 the CPSC has violated [FOIA] at all." *Id.* at 383. The Supreme Court remarked that the  
6 "defendants and the requesters *sharply disagree* on this question, as has been evidenced at every  
7 stage of litigation. If the requesters prevail on the merits of their claim [in the D.C. Court], the  
8 CPSC will be subject to directly contradictory court orders, a prospect which the federal  
9 defendants naturally wish to avoid." *Id.* (emphasis added).

10           In essence, the dispute in *GTE Sylvania* was about the ultimate legal effect of the desired  
11 declaratory relief. The parties agreed that declaratory relief was warranted under the law, but  
12 disagreed on whether that declaration would render the CPSC's prior conduct a violation of  
13 federal law. The CPSC also wanted to avoid facing contradictory court orders. This sort of  
14 adversity is not present among Plaintiffs and the Prime Defendants in this case. They may  
15 disagree whether alter ego liability is ultimately beneficial to them, but they do not dispute the  
16 legal effect of a declaration of no alter ego liability. There is no question, let alone a "sharp  
17 disagreement," that they would become liable for each other's obligations. Furthermore, the  
18 Prime Defendants would not face contradictory court orders were this Court to issue a declaration  
19 in Plaintiffs' favor.

20           The Court did not commit clear legal error in holding that the alter ego claim does not  
21 present a justiciable controversy under Nevada law with regard to the Prime Defendants.

22           **D. Contribution and Indemnity Claims — Ripeness**

23           "The factors to be weighed in deciding whether a case is ripe for judicial review include:  
24 (1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues  
25 for review." *Herbst Gaming v. Heller*, 141 P.3d 1224, 1231 (Nev. 2006) (internal quotation  
26 marks and citation omitted). Federal courts look to the same two factors to determine the ripeness  
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1 of an issue.<sup>1</sup> *Ass'n of Am. Medical Colleges v. U.S.*, 217 F.3d 770, 779–80 (9th Cir. 2000).  
2 Issues are generally considered to be suitable for review if they are questions of law that do not  
3 depend on additional factual development. *See id.* at 780; *T.R. v. State of Nevada (In re T.R.)*, 80  
4 P.3d 1276, 1280 (Nev. 2003).

5 A primary focus in such [ripeness] cases has been the degree to which the harm  
6 alleged by the party seeking review is sufficiently concrete, rather than remote or  
7 hypothetical, to yield a justiciable controversy. Alleged harm that is speculative or  
8 hypothetical is insufficient: an existing controversy must be present. While harm  
need not already have been suffered, it must be *probable* for the issue to be ripe for  
judicial review.

9 *Herbst Gaming*, 141 P.3d at 1231 (internal quotation marks and citation omitted) (emphasis  
10 added).

11 Plaintiffs cite various cases holding that disputes between insurers and insureds as to the  
12 duties imposed by an insurance contract meet the “case and controversy” requirement of Article  
13 III. But as noted above, the pertinent ripeness inquiry here depends on Nevada law rather than  
14 the U.S. Constitution and federal law. The alleged harm at issue is a finding of liability against  
15 Plaintiffs in the Texas Fraud Lawsuit (where they are defendants). The existence of that lawsuit  
16 makes liability possible, but not *probable*. And in the only similar Nevada case, the Nevada  
17 Supreme Court held that a tort victim could not litigate the scope of the tortfeasor’s insurance  
18 coverage before obtaining a determination of primary liability. *Knittle v. Progressive Ins. Co.*,  
19 908 P.2d 724, 724 (Nev. 1996).

20 To the extent that federal cases examining ripeness under Article III for insured-insurer  
21 disputes are applicable, Plaintiffs’ argument still fails. This case is not an insurance dispute. The  
22 issues of contribution and indemnity are analogous, but Plaintiffs and the Prime Defendants are  
23 not in an insured-insurer relationship. Declaratory judgments are regularly issued as a means of  
24 interpreting contracts and other written documents. *U.S. v. Sacramento Municipal Utility Dist.*,

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26 <sup>1</sup> Although the Nevada Declaratory Judgment Act and the federal Declaratory Judgment Act are  
27 not coextensive on all issues, the Court sees no distinction between them for the purpose of determining  
28 whether the instant claims present justiciable controversies that are ripe for judicial review. The Court  
thus looks to federal case law to assist in the ripeness inquiry.

652 F.2d 1341, 1342 (9th Cir. 1981); *see also Jaynes Corp. v. Am. Safety Indemnity Co.*, 925 F. Supp. 2d 1095, 1101–02 (D. Nev. 2012). But there is no such contract to interpret here. The Supreme Court and Ninth Circuit cases cited by Plaintiffs involve disputes between insurers and insureds. *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270 (1941); *Gov't Employees Ins. Co. v. Dizon*, 133 F.3d 1220 (9th Cir. 1998); *Am. States Ins. Co. v. Kearns*, 15 F.3d 142 (9th Cir. 1994). As such, they are not binding in this case; nor do they establish a bright-line rule that contribution and indemnification claims in insurer-insured disputes are *always* ripe before a finding of primary liability. To the contrary, even in such cases, federal courts have not unanimously held that a claim seeking a declaration of coverage is ripe. In *Hecht*, this Court held that contribution and indemnification claims brought in a separate action from the primary liability claim are generally not ripe for adjudication. *Hecht v. Summerlin Life Ins. Co.*, 536 F. Supp. 2d 1236, 1240–41 (D. Nev. 2008) (cataloging applicable cases).<sup>2</sup>

For the reasons set forth in the Prior Order, the Court finds the distinction highlighted in *Hecht* is compelling. In addition, Plaintiffs will suffer no hardship by raising contribution and indemnification in the Texas Fraud Lawsuit rather than in the instant case. The Court did not commit clear legal error in holding that the contribution and indemnification claims are not ripe under Nevada law.

### 3. Needless Determination of State Law

District courts “should avoid needless determination of state law issues[.]” *Huth v. Hartford Ins. Co. of the Midwest*, 298 F.3d 800, 803 (9th Cir. 2002). “A ‘needless determination of state law’ may involve an ongoing parallel state proceeding regarding the ‘precise state law issue,’ an area of law Congress expressly reserved to the states, or a lawsuit with no compelling federal interest (e.g., a diversity action).” *Keown v. Tudor Ins. Co.*, 621 F. Supp. 2d 1025, 1031

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<sup>2</sup> Moreover, insurers have a distinct, heightened interest in determining coverage before liability. Insurance policies usually include a duty to defend. If an insurer elects not to defend and a court determines that the insurer should have defended, the insurer can be liable for punitive damages for bad faith. The decision not to defend, if incorrect, creates a significant risk of imminent harm to an insurer. Neither Plaintiffs nor the Prime Defendants face such imminent harm; there is no duty to defend at issue in this case.



(D. Haw. 2008) (quoting *Cont'l Cas. Co. v. Robsac Indus.*, 847 F.2d 1367, 1371–72 (9th Cir. 1991), *overruled in part on other grounds by Dizol*, 133 F.3d at 1225). “However, there is no presumption in favor of abstention in declaratory actions generally, nor in insurance cases specifically.” *Dizol*, 133 F.3d at 1225. Courts should strive to avoid piecemeal litigation. “Remanding only the declaratory component of ... an action will frequently produce piecemeal litigation, a result which the Declaratory Judgment Act was intended to avoid, rather than promote.” *Id.* at 1225–26.

Plaintiffs assert that there are three questions of first impression under Nevada law: (1) whether there is a justiciable controversy under Nevada law for the purposes of a declaratory judgment when the parties agree but do not desire “precisely the same result;” (2) whether Plaintiffs’ contribution and indemnity claims can be determined in this action; and (3) whether an LLC is subject to alter ego liability. Of these, only the third question gives some pause to the Court, as it is an unsettled issue of state law.

As there is no ongoing parallel proceeding and Congress has not expressly reserved the issue of alter ego liability to the states, the question is whether there is a compelling federal interest in the issue. The federal Declaratory Judgment Act’s desire to avoid piecemeal litigation is sufficiently compelling. Currently, both the Texas Fraud Lawsuit and the instant case are before this Court. Remanding only the alter ego claim would create piecemeal litigation. Splitting the cases between state and federal court would not only significantly heighten the risk of judicial inefficiency, it seems quite likely to cause unnecessary delay. *Dizol* counsels against this result. 133 F.3d at 1225–26. Furthermore, the Texas Fraud Lawsuit and the instant case are capable of consolidation as long as they remain in the same court.

In light of the lack of a presumption in favor of abstention and the federal interest of avoiding piecemeal litigation, the determination of the state law issue of alter ego liability is not “needless.” The Court declines to abstain.

#### **E. Interlocutory Appeal**

An immediate appeal of an order that is otherwise unappealable is permissible if the district judge is “of the opinion that such order involves a controlling question of law as to which



1 there is substantial ground for difference of opinion and that an immediate appeal from the order  
2 may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). Once  
3 the district judge certifies an interlocutory appeal in writing, the Court of Appeals has the  
4 discretion to permit the appeal. *Id.* A question of law is controlling if “the resolution of that issue  
5 on appeal could materially affect the outcome of litigation in the district court.” *In re Cement*  
6 *Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1982).

7 A substantial ground for difference of opinion exists where reasonable jurists  
8 might disagree on an issue’s resolution, not merely where they have already  
9 disagreed. Stated another way, when novel legal issues are presented, on which  
10 fair-minded jurists might reach contradictory conclusions, a novel issue *may* be  
certified for interlocutory appeal without first awaiting development of  
contradictory precedent.

11 *Reese*, 643 F.3d at 688 (emphasis added). Notably, the district court is not required to certify an  
12 interlocutory appeal if fair-minded jurists might disagree; the court retains some level of  
13 discretion as it “may” certify a question for appeal. As to material advancement, the appeal need  
14 not have a final, dispositive effect on the litigation. *Reese v. BP Exploration (Alaska) Inc.*, 643  
15 F.3d 681, 688 (9th Cir. 2011). Finally, the standards for certifying an appeal under 28 U.S.C.  
16 § 1292(b) are very strict; appeals should be certified only in extraordinary situations. *Syufy*  
17 *Enters. v. Am. Multi-Cinema, Inc.*, 694 F. Supp. 725, 729 (N.D. Cal. 1988); *see Robbins Co. v.*  
18 *Lawrence Mfg. Co.*, 482 F.2d 426, 429 (9th Cir. 1973) (“The Court of Appeals will grant such  
19 interlocutory review only in extraordinary cases where decision might avoid protracted and  
20 expensive litigation.”).

21 The questions on appeal would be (1) whether the alter ego claim presents a justiciable  
22 controversy under Nevada law; and (2) whether the contribution and indemnification claims are  
23 ripe for judicial review under Nevada law. As to the first issue, Nevada law is quite settled on  
24 what constitutes a justiciable controversy. *Doe v. Bryan*, 728 P.2d 443, 444 (Nev. 1986). The  
25 application of the law to the present facts, while not entirely straightforward, is not so  
26 complicated or novel that reasonable jurists would disagree. Plaintiffs’ and the Prime  
27 Defendants’ disagreement with the Court’s decision is insufficient to establish a substantial  
28 ground for difference of opinion.

1           Regarding the second issue, Nevada ripeness law is also settled. Although there are no  
2 Nevada Supreme Court cases on all fours with the instant facts, *Knittle* is very instructive. 908  
3 P.2d 724. Furthermore, the Court is skeptical that an interlocutory appeal would materially  
4 advance the ultimate termination of the litigation. Before the Prime Defendants can be held liable  
5 for contribution and indemnification, the Plaintiffs' liability must be established in the Texas  
6 Fraud Lawsuit. Moreover, most of the factors that could give rise to alter ego liability likely will  
7 be explored in the Texas Fraud Lawsuit. If anything, an interlocutory appeal would dramatically  
8 slow this case. Finally, the parties will have an opportunity to appeal these issues in the regular  
9 course of events.

10           For the foregoing reasons, the Court denies the request to certify an interlocutory appeal  
11 of the denial of the motion to remand.

12           **F. Stay Pending Appeal**

13           In light of the Court's denial of the request to certify an interlocutory appeal, the motion  
14 for stay pending appeal is moot.

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16           **III. CONCLUSION**

17           For the reasons set forth above, the Court hereby ORDERS:

- 18           1. Plaintiffs' motion for reconsideration (Dkt. No. 56) is DENIED.  
19           2. Plaintiffs' request for certification of an interlocutory appeal is DENIED.  
20           3. Plaintiffs' motion for stay pending appeal (Dkt. No. 59) is DENIED as moot.

21           DATED this 4<sup>th</sup> day of November, 2013.

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25           ANDREW P. GORDON  
26           UNITED STATES DISTRICT JUDGE  
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